IN THE

Supreme Court of the United States

OCTOBER TERM, 19[redacted]57

No. [redacted] /

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Statutes and Executive Promulgations Involved.

The Government's petition sets forth statutes which are not involved and fails to set forth a statute and Executive promulgations that are involved.

Section 145 (the penalty provision) of the Internal Revenue Code of 1939, quoted in the petition, is not involved because no question as to guilt or innocence was passed on by the Court of Appeals or is now presented. Section 293 (civil fraud penalties), quoted in the petition, has never been involved and was not presented to the Court of Appeals.

Provisions that are involved are:

Section 3761 Internal Revenue Code of 1939:

> "SEC. 3761. COMPROMISES.
>
> (a) *Authorization.*—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.
>
> (b) *Record.*—Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—
>
> (1) The amount of tax assessed,
>
> (2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and
>
> (3) The amount actually paid in accordance with the terms of the compromise."
>
> (26 U. S. C. 1952 ed., Sec. 3761.)

Statements of Disclosure Policy:

The Government's petition fails to set forth any statements of the disclosure policy, and at pages 5 and 6 makes conclusory and inaccurate statements with respect to it. Relevant, accurate excerpts from Statements of the Disclosure Policy are as follows:

> 1. "Taxpayers who have failed to declare their full income and pay the tax due 'may escape criminal prosecution through voluntary disclosure of the deficiency only in cases where such voluntary disclosure is made before investigation is started.'" (Statement of Secretary of the Treasury Morgenthau, May 28, 1945, R. 19.)

2. "* * * the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out.'" (Secretary of Treasury Vinson, Aug. 21, 1945, R. 19.)

3. "Mr. Nunan again stressed the Bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward voluntarily and pay up delinquencies plus interest and civil penalties before the Bureau has begun investigating their cases." (Press Release of Treasury Department, Oct. 5, 1945, R. 3132.)

4. "And what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the Government. * * * The simple statement that 'I have filed false tax returns and I want to make the Government whole' would constitute a complete disclosure. * * * We are not concerned with the motivating force behind an individual's deciding to come in and talk to us about his evasion. If he 'gets religion' before we have done anything he will not be prosecuted. (Address by J. P. Wenchel, Chief Counsel of the Bureau, publicly released by Treasury, May 14, 1947, R. 3134, 3136-7.)

5. "One of the important elements in settling cases, with civil penalties and without prosecution, has been the Treasury's policy of not prosecuting persons who make a voluntary disclosure of their fraud before the Treasury begins an investigation of their cases. This means that, in order to assure himself against criminal prosecution, a repentant taxpayer must disclose his fraud to an official of the Bureau of Internal Revenue before the case has been assigned for examination and before an investigating officer of the Bureau has requested advice from appropriate officers of the Bureau regarding the case. Prior to such action * * * a taxpayer may make a voluntary disclosure and escape

criminal prosecution even though his name may appear in an inactive file of suspects. This presumes, of course, that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability." (Press Release of the Treasury, May 25, 1947, R. 3140.)

Abandonment of Disclosure Policy:

"While it has been the long-established policy of the Treasury Department to refrain from recommending criminal prosecution where taxpayers make voluntary disclosure of intentional tax evasion prior to the initiation of an investigation by the Bureau of Internal Revenue it has been concluded that such policy will no longer be followed. * * * In the administration of the policy it has been difficult and at times impossible to ascertain whether the disclosure was made because the taxpayer realized he was under investigation or whether the disclosure was in fact voluntary and in reliance on the immunity held out by the policy." (Treasury Department Information Service Release of January 10, 1952, R. 3142.)

STATEMENT.

The Court of Appeals held that convictions of respondents in a criminal income tax case must be reversed and the case sent back for a new trial because the District Court erred in denying a pre-trial motion to suppress evidence furnished, or made available, to the Government in reliance upon the immunity promises of the so-called "voluntary disclosure doctrine."

The "Statement" of the Petition obscures the narrow, and largely academic, question on which certiorari is sought, and by commingling asserted evidence on the merits with that bearing on the pre-trial motion to suppress evidence, presents the case in inaccurate focus.

The *facts* as to respondents' voluntary disclosure of tax

irregularities in reliance on the Treasury's promises of immunity to those who did so, are accurately set forth by the Court of Appeals. The petition, despite its claim that *certiorari* should be granted because the Court of Appeals exceeded its powers of factual review, does not quarrel with those undoubted facts but with the conclusion the Court drew from them. In fact by its Petition for Rehearing in the Court of Appeals the Government (with one minor exception which the Court corrected—Pet. p. 73), *accepted the facts as stated by the Court of Appeals.* But the present Petition seeks to find fault with them and to color the case with carefully selected items of evidence bearing on guilt or innocence. A restatement is necessary to place the suppression issue in true perspective:

Shotwell Manufacturing Company was a substantial Chicago candy manufacturer. (It actually paid $827,000 taxes for the years 1945 and 1946.) In 1944 one David Lubben, a New York trader, asked whether he could get its candy to sell if he could produce chocolate (then in short supply), for Shotwell. He was told that he could. Various "trade" or "barter" deals took place in late 1944 and the first half of 1945 in which, in return for making raw materials (principally chocolate) available, Lubben was placed on Shotwell's customer list and sold candy. According to respondents, these transactions were all at ceiling prices; according to Lubben, he paid cash "overages" or "premiums" on the candy he received but did not charge a premium on the material he supplied.

In the spring of 1945 the ceiling price on corn became unbalanced with respect to that on hogs; farmers, finding it more profitable to use their corn for feed, withdrew it from the market. As a consequence corn refiners were unable to supply corn syrup (essential to the manufacture of Shotwell's candies) in normal and required amounts. When

this shortage developed Shotwell cut Lubben, a new customer, off its list and sold him nothing for three months commencing in June 1945. (Def's Exs. 1 and 2, R. 3091 *et seq.*)

Late in September 1945, according to respondents (R. 2546, 2574), Lubben approached Shotwell and offered to pay cash "overages" on candy, which cash would be used to pay over-ceiling premiums on raw corn which would then be made available to refiners at ceiling; the refiners in turn would sell Shotwell a portion of the resulting syrup at ceiling. Whether over-ceiling sales of candy to Lubben began at this time, as respondents contend, or had started earlier as Lubben claimed, was an issue at the trial. But admittedly at this time, and for about 9 months thereafter, over-ceiling sales were made to Lubben (alone of all Shotwell customers), although not admittedly at the *rates* of overage which he claimed.

Although respondents were aware (R. 774) that Shotwell was violating OPA laws by these over-ceiling sales of candy to get cash for over-ceiling premiums on corn,[1] they believed no income tax problem was involved because the receipts and disbursements balanced (except for a small terminal balance which remained when the corn shortage ended and which was reported on the company's books). (R. 205, 1827-8, 2554, 2585.) According to respondents, the transactions ended in the summer of 1946 when the ceiling on corn was removed; notwithstanding this, Lubben claimed that they continued for some five or six additional months.

In early 1948 respondents were advised by their auditor that the Commissioner of Internal Revenue did not concede that over-ceiling expenditures could be deducted from

1. The Government, through the Commodity Credit Corporation, itself bought corn at over-ceiling prices, R. 2420, 2682, 2709, Def. Ex. 89, 90 and rejected Ex. 74.

or balanced against, over-ceiling receipts and that possible criminal penalties might result from Shotwell's failure to report them. (R. 170-2, 1828-31.)

In January or March 1948 (the difference in date is immaterial), respondents, acting in reliance on the Treasury's invitations for voluntary disclosures, voluntarily disclosed these transactions to Assistant Collector Sauber who assured them that no investigation had been commenced (R. 231, 257, Opinion at Pet. p. 46). Sauber, pursuant to Treasury policy that was followed by the Commissioner until long after the indictment of March 14, 1952 herein, advised respondents that the over-ceiling expenditures would not be recognized as a deduction.[2] Cain, Shotwell's president, told Sauber that Shotwell had dealt with shadowy characters and paid them in cash. He said:

> "As to our expenditures I just can't tell you anything. I don't know."

Sauber replied:

> "* * * it wouldn't do any good if you did know because we wouldn't allow them anyway. We absolutely won't allow over-the-ceiling expenditures." (R. 232.)

As the Court of Appeals points out (Pet. pp. 42, 55), Shotwell then offered to pay any additional tax which the Bureau might assess based upon its additional *gross* over-

2. The Treasury's position appears in IT 3724, 1945 Cum. Bul. 57; 1949—1 CB 6. See also cases collected in 2 Prentice Hall 1955 Fed. Tax Service, Par. 11,308. On December 28, 1948, long after the disclosure here, the Tax Court held in *Lela Sullenger*, 11 T.C. 1076, that over-ceiling payments for goods resold, or used in manufacturing, could be considered as part of the cost of goods sold when determining taxable income. However, the Commissioner refused to recognize this case and fought other cases in the courts. Not until September 14, 1952, six months after the instant indictment and two months before the suppression hearing (November 12, 1952), did the Commissioner acquiesce in the *Sullenger* decision and withdraw IT 3724 (1952-2 Cum. Bul. 3, 7), which until that time had been binding on all agents with whom respondents dealt.

ceiling income and asked for a bill, reserving only the right to file claim for refund if it decided to contest the Bureau's position that over-ceiling expenditures were not deductible. Sauber assured them,

> "That is perfectly all right. All we want to do is get the tax. * * * I am a collector and I want to get the tax." (R. 232.)

Sauber suggested that respondents collect what information they could so that they could reconstruct the accounts and that agents would investigate the case. Cain assured him the Shotwell staff would do this and would ascribe to all of the Lubben transactions the highest amount of "overage" that Lubben might claim. (R. 232.) Promptly elaborate "recapitulations" were prepared which disclosed every sale Shotwell ever made to Lubben.[3] (Def's Ex. 1, R. 3091 *et seq.* Shotwell spent $20,000 doing this and furnishing clerical help to the Treasury to assist it in its investigation R. 200.) These "recaps" carried the "overages" in accordance with what were then understood to be Lubben's figures rather than the lesser amounts respondents claimed were correct.[4] This history is incorrectly compressed in the

3. The statement in Judge Lindley's dissent that "Sauber was not advised that Shotwell made other black market sales of goods on which no part of the transaction was reflected on the company's books" is correct only in an extremely literal sense and is grossly incorrect in its overall implication. When respondents *orally* disclosed to *Sauber personally* they did not purport to be giving a detailed accounting. However, the compilations they promptly prepared at his direction listed every transaction that subsequently was called into question.

4. These recapitulations were one of the items respondents subsequently sought to suppress. They were not suppressed, and were received in evidence as admissions of actual fact that Shotwell had received the amounts there shown despite the fact that the Government's own, and completely uncontradicted, evidence was that they were not represented to be true as to the amount of overages shown. They were based on applying to Shotwell's entire list of shipments (including "trade" or "barter" deals) the highest rate of overage which Lubben was understood "orally" to claim or as he was believed to show on his purported "records" which were never admitted to be true. (R. 2816, 2838, 2841.)

Petition (p. 6) to the misleading statement that in the summer of 1948 respondents "submitted schedules purporting to show that the corporation had received approximately $380,000." At no time did respondents "show" that Shotwell received any such amount. They "showed" the dates and invoice amounts of all transactions with Lubben and what the overages would be *if* all of Lubben's claims, as then understood, were given credence, *i. e.*, "The whole crux of the computation is based upon what Lubben claimed." (R. 2841.)

These compilations were turned over to the investigating agents when they commenced their investigation. (R. 188-195, 319.) Indicative that everyone then believed that a good disclosure had been made is the fact that when one of the compilations was redrafted for greater clarity, the totals shown on the redrafted document, also turned over to, and accepted by the agents, bore the identifying or connecting notation, "*Used in disclosure recap*". (R. 3097-8-9, 3101.)

As the investigation proceeded some of the agents asked for names of the recipients of Shotwell's over-ceiling expenditures. It is uncontradicted that Cain was given the impression that these names were not needed to assess Shotwell's supposed tax but might furnish leads to possible tax violators. And in 1951 Sauber prepared a memorandum in which he reported on 1949 conversations that the case would not be closed until the Shotwell employees

> "* * * cooperated with their Government and disclosed the names of the individuals to whom these over-the-ceiling payments were made." (R. 3156. See also R. 241, 259, 273-4, 276, 290.)

The foregoing statement, which consciously or uncon-

sciously concedes that the money in fact was paid out,[5] *is the only reason ever given by the Treasury for not honoring the disclosure.* Although the Petition now speaks (p. 19) of respondents' "claim of deductible expenditures" and asserts a necessity of verifying such a claim to determine whether to impose a civil fraud penalty, *there is not a scintilla of evidence of the presentation of such a claim by respondents, or the assertion of such a position by the Government, at any time material to the disclosure.*[6] On

5. On the trial every witness, Government or defense, having any knowledge of the facts testified that whatever "overage" cash Shotwell received (except the small terminal balance) was paid out for corn. (R. 775, 782, 1732-4, 1736, 1737, 1740, 1742, 1748, 1783-5, 1790, 2010, 2012, 2462, 2467, 2547-8, 2577, 2581-2.)

6. The present assertion that the agents needed a full explanation of Shotwell's black market expenditures in order to assess a civil fraud penalty is indeed a cynical one *in view of the fact that on September 15, 1955 the agents actually did assess such penalties.* The Treasury's action presumably was unknown to, and unapproved by the authors of the petition for *certiorari.* In any event it leaves them in the difficult position of having assured the Court on October 17, 1955 that something could not occur which in fact had occurred September 15, 1955.

The specious idea that the agents needed a full explanation of Shotwell's black market expenditures in order to determine whether to assess a civil fraud penalty, even though Shotwell was not presenting a claim for deductions because of them, is a lawyer's erroneous afterthought that first saw the light of day during oral argument in the Court of Appeals.

So far as civil fraud penalties are concerned, it has been clear from the beginning that the Commissioner, rightly or wrongly, would have assessed such a penalty on the theory that the initial return had not included all gross income even though respondents had presented engraved receipts for over-ceiling payments in a sum equal to the unreported over-ceiling receipts. See, for example, *Colonial Rubber Co.*, 10 TCM 434; *Benjamin Weisman*, 10 TCM 409, aff'd., 197 F. 2d 221 (1st Cir.); *William A. Prater*, 12 TCM 872; *Marsha Silk Mills, Inc.*, 13 TCM 585; *David J. Pleason*, 22 TC 361; *Harris v. United States*, 125 F. Supp. 175 (M.D. Ga.); *John W. Harrison*, 11 TCM 1000. But certainly unless and until Shotwell presented, by way of an amended return or a claim for refund, a claim for deductions, the agents were under no duty or necessity of investigating. That respondents' failure to identify the recipients did not present the slightest barrier to the Treasury's ability to make a 50% fraud assessment is demonstrated by the fact that it did precisely that on September 15, 1955.

the contrary, respondents not only did *not* file such a claim, but they, and all agents concerned, understood that Shotwell was going to pay a tax on the gross amount of the over-ceiling receipts as the agents determined them to be. It was precisely because they had been informed by their own auditor (and subsequently by every agent of the Bureau) that no such deduction was permissible, that respondents had been impelled to make the disclosure.

But by the time of trial (September 1953) the law, if not clearly established at the time of the suppression hearing (November 1952), had become clear that over-ceiling expenditures for raw materials could be claimed as a deduction. (See Note 1, *ante*.) *The difference between the law that respondents were faced with at the time of disclosure, when black market expenditures were of no help to them and immaterial to an assessment of Shotwell's tax, and the law at time of trial, is one which the Petition obscures and which the District Court did not grasp.*

Respondents, at trial, were able to, and did, assert a defense that no additional net income resulted from the Lubben transactions. They proved expenditures necessarily in an amount of about $160,000, which expenditures the Government finally admitted in the Court of Appeals (Petition for Rehearing, p. 11). This sum was as great as that which any Government witness (except Lubben), claimed Lubben had paid (R. 2835, 1747, 782).

The Petition, seeking to create the impression that respondents did not reveal the full extent of their dealings with Lubben, asserts (p. 11) that respondents' disclosure summary, "revealed the receipt of approximately $380,000 in cash overages from Lubben for 1944, 1945 and 1946," whereas the Government adduced evidence on the trial tending to prove receipt of approximately $450,000 in 1945 and 1946 (Pet., p. 14). If it were conceded (which

it is not), that the Government made the latter proof, the undisputed facts as to the disclosure summary are:

1. Every sale or shipment to Lubben was revealed.

2. The amount of "overages" applied to these shipments in respondents' calculations was never represented to be an admission of cash actually received but to be a computation of what Lubben claimed. (See footnote 3, *ante*.)

3. On this basis the initial summary G. Ex. 5 (R. 3090) showed a gross computation of $415,074.14 for 1945 and 1946 ($213,415.70 plus $201,658.44). Respondents asserted that even if such *rates* be assumed, Lubben did not make payment on certain shipments and suggested a deduction of $48,614.70 on that account.[7] Moreover, respondents did not compute or list overages on unbilled shipments which overages Lubben tacked on the amount of about $35,000 at the trial. These explanations, actually contained, although not quickly observable by a court, in the computations, explain the alleged disparity between the initial computation of Lubben's claims at $380,000 and his subsequent testimony of $450,000. In any event, *all* of the transactions, and both versions of them, were revealed and the agents were invited to determine the amount of overages on the version they might choose to accept.

4. The Petition asserts that Cain presented "meaningless plug figures" to show offsetting black market expenditures. As the Court of Appeals finds, black market expenditures were immaterial to an assessment of Shotwell's tax under the rules the Treasury was insisting on. So far as Shotwell's tax was concerned it made no difference to the Treasury in 1948 whether whatever Shotwell received remained in its till or was expended on the black market because the black market expenditures would not be recognized regardless of to whom paid and regardless of how well documented. Having been willing to concede that gross income be computed in accordance with Lubben's

7. See entry "Less items uncollected due to financial difficulties," G. Ex. 5, R. 3090.

claims rather than the true facts, respondents obviously could not present a true account of how money that Shotwell did not actually receive was spent. Cain said "It isn't going to make any difference anyway, [*i.e.*, the disbursements were not going to be allowed], so let's work the thing backwards." [merely present balancing figures] (R. 258).

5. The jury's verdict did not mean that it found there was an understatement of gross income in the amount of $450,000 or $380,000 or $100,000—all it had to conclude was that there was "substantial" unreported income

ARGUMENT.

The Petition should be denied because it presents no legal question of sufficient importance to warrant granting the writ:

It concedes that where there was compliance with the Treasury's former "voluntary disclosure policy", that the discloser at least is entitled to suppression of evidence obtained through the disclosure (Pet., p. 17). What might have been a major legal question calling for this Court's decision, *i. e.*, does suppression result from compliance, is conceded.

The only question then remaining is whether the particular and undisputed facts of this case[8] show compliance and whether that fact pattern is a common one, likely to be repeated in remaining cases involving the disclosure doctrine, so that re-examination of it and exercise of this Court's supervisory authority is warranted. Plainly, the Petition does not meet the test of this question.

The most it is able to say (p. 20) is that the Solicitor General has been "informed" by someone in the Internal Revenue Service that there are "between 60 and 70 pending cases in which the question of a voluntary disclosure made under the former policy either has been, or may be, raised." A healthy caveat may be raised to such elusive "information"; a caveat that applies both to the number of the asserted cases and to the nature of the asserted potential questions.

8. Observe that the Court of Appeals based its decision on "only those facts shown by the Government's evidence wherever there was a conflict" (Pet., p. 42) and that the Petition, despite its strident but unspecific and undocumented claims of "conflicting evidence," does not contest the accuracy of this statement in the opinion.

To say that "a" question of some sort as to voluntary disclosure "may be" raised, is not to say that the narrow question presented by these facts has been, or will be, raised elsewhere and therefore should be decided by this Court. Up to this time the facts here presented are unique. If there was another comparable case pending elsewhere the Petition would not have failed to refer to it. It is apparent therefore, that if *certiorari* were to be granted, this Court's ultimate decision would establish no general rule of law.

I.

The Court of Appeals Did Not Hold That a "Partial" Disclosure Was Sufficient and Its Decision Is Not in Conflict With Any Other.

The first reason asserted for granting the writ is that it is "uncertain" whether the majority opinion means that a partial disclosure is sufficient to bring a taxpayer within the terms of the policy; that "*if*" it does so hold it is contrary to other cases (Pet. p. 20).

The answer is that the majority does not hold a "partial" disclosure is sufficient. On the contrary, its explicit predicate—the test against which it applied the undisputed facts—was that there must be a full disclosure of facts relevant to the tax liability. So far as it lays down a rule of law for the future, it is that there must be a full disclosure. This is demonstrated by the following language from the Court's opinion appearing on page 54 of the petition (emphasis ours):

> "The insistence of the revenue agents that defendants go beyond their *duty of disclosing facts material to the determination of their unreported tax liability*, by informing the Government of the names of the persons to whom they paid over-the-ceiling prices for raw ma-

terials, was met with a refusal by defendants. This refusal *was not inconsistent with a full disclosure of relevant facts on their tax liability.*"

The Court of Appeals simply held that the matters as to which the District Court felt there was bad faith were all irrelevant to a determination of Shotwell's tax.

There is no difference between the substantive test enunciated here and expressed (to the extent it is expressed) in *Centracchio* v. *Garrity*, 198 F. 2d 382, 389 (C. A. 1st), certiorari denied, 344 U. S. 866; *Bateman* v. *United States*, 212 F. 2d 61, 65-66 (C. A. 9th); *Monroe* v. *United States*, 215 F. 2d 81, 84 (C. A. 5th), certiorari denied, 348 U. S. 914; or *Application of Henry Lustig Co.*, 67 F. Supp. 306, 310 (S. D. N. Y.) affirmed, 163 F. 2d 85 (C. A. 2d), certiorari denied, 332 U. S. 775, referred to in the Petition.

Any notion that certiorari should be granted because the instant decision can be construed to authorize "partial" disclosures is wholly untenable.

II.

The Court of Appeals Did Not Substitute Its "Findings of Fact" for Those of the District Court.

The second reason asserted for granting the writ is wholly a procedural one that does not concern the merits of the suppression question—it is that the Court of Appeals improperly exercised its appellate function by "substituting its findings of fact for those of the District Court."

The theme reiterated throughout the petition is that Judge Nordbye found the disclosure was lacking in good faith, and that the Court of Appeals entrenched upon his fact-finding province by overturning this so-called "finding of fact." To build its argument, the petition wrenches

this asserted "fact-finding" out of context and erroneously asserts that (a) it turned upon the resolution of conflicting testimony (p. 21) and (b) it related to facts affecting Shotwell's tax liability (p. 22). The introductory paragraph to the Petition's statement of the Question Presented is erroneously cast to create the impression that the alleged "fact-finding" related to material facts as to "their unpaid taxes", whereas, as we shall show, all of Judge Nordbye's findings of fact, his conclusion of "lack of good faith," and his strong language *were directed solely to facts bearing on the possible tax liability of Shotwell's recipients, and not to Shotwell's tax liability.*

The Court of Appeals overturned none of Judge Nordbye's findings of fact, but held that since Shotwell had fully disclosed the facts relevant to its own tax liability, a finding of lack of good faith could not be predicated on immaterial matters. The difference between Judge Nordbye and the Court of Appeals is not over facts but over law. This is conclusively established by the following passage from the opinion of the Court of Appeals:

> "We therefore hold that defendants' inability or refusal to name the recipients of Shotwell's illegal disbursements, did not show that their offer of disclosure was in bad faith." (Pet. p. 53.)

In that passage the Court of Appeals is accepting Judge Nordbye's factual determinations but differing with him as to the law.

The invalidity of present contention of the Petition is exposed by the fact that although the Department of Justice filed a vigorous petition for rehearing in the Court of Appeals, requesting *en banc* reconsideration, this contention was not raised. If the Court of Appeals had so far departed from the proper course of review as the present Petition asserts, we may be sure that the Department, as

it would have been duty bound to, would have called it to that Court's attention—and probably quite pointedly. But in its petition for rehearing the Department proceeded upon the correct premise that what the Court of Appeals had done was to announce its view of what legal conclusions flowed from the material and substantially uncontradicted facts.

In the Court of Appeals the Government did not challenge the facts as recited by that court with but one exception. In the single minor, undeterminative instance in which the Court of Appeals had inadvertently relied on contradicted evidence and perhaps obliquely overturned a credibility determination by Judge Nordbye (with respect to a conversation by Olson), the petition for rehearing pointed it out and the Court of Appeals promptly corrected its opinion (Pet. p. 73). This record scarcely permits the Department now to assail the Court of Appeals for having made "an extraordinary departure from the accepted and usual course of judicial proceedings."

This failure to raise the point below is even more significant when it is realized that the dissent in the Court of Appeals was in part on the theory that sufficient weight had not been given to the trial court's findings of fact. The Department did not endeavor to support that theory in its petition for rehearing below, and although it now advances the *theory* here, it does not support Judge Lindley's reasoning but goes at the matter by quite another, and just as erroneous a route.

The dissent had said there were "two factual questions" presented below, namely, what was disclosed and was the disclosure made in reliance on the policy (Pet. p. 67). The error in this was that while those questions called for factual determinations there was no substantial conflict in the evidence:

It was clear that respondents had disclosed fully as to the receipt of income; that, whether unable or disinclined, they had not fully reported on the expenditures they were told were immaterial to the tax liability. It was equally clear they disclosed in reliance on the immunity promise of the disclosure policy, and that as a matter of law their motives in so relying were immaterial. No conflicts, no credibility determinations were involved. Faced with the fact that Judge Lindley's reasons could not be supported, the present Petition, in part by distorting the record, advances new ones. These shifts and changes would not be resorted to if there was substance to the claim that the Court of Appeals made new fact findings.

The basic answer is that the Court of Appeals held merely that a conclusion of lack of good faith in the disclosure could not be predicated on findings of fact related solely to matters that were immaterial to an assessment of Shotwell's tax at the time the disclosure was made, viz., Shotwell's black market expenditures.

Judge Nordbye made no finding that respondents failed to disclose their transactions with Lubben on which they were told the tax would be assessed without regard to expenditures.

Judge Nordbye predicated his holding of lack of good faith and his harsh language exclusively on facts relating to Shotwell's expenditures. He found (a) that an informal record which might have identified some recipients of Shotwell's expenditures was destroyed,[9] and (b) that the list

9. This so-called record was a handwritten memorandum kept by Mrs. Morrill one of the Shotwell employees who for a time had charge of the box in which cash received from Lubben was placed awaiting expenditure for corn premiums. She had not been told to keep the memo; had never shown it to Cain; upon asking him whether it was of any value and should be saved she was told it was of no value and could be destroyed (R. 408-9, 785). Because of the agents' advice to Cain that black market expenses would not be recognized his view that the memo was of no value is easily understandable.

of expenditures on the Busby compilations was fictitious. From these factual findings he held that a lack of good faith could be inferred. None of the disclosure pronouncements, however construed, ever said more than that the taxpayer must cooperate in supplying data relevant to *his* tax. None said he must go beyond that point and turn informer on other possible violators. But Judge Nordbye held that "good faith" so required.

The Court of Appeals, changing none of the facts, held to to the contrary. That was a decision of law rather than fact. And right or wrong (we submit it is obviously right), it presents no departure from the proper function of an appellate court and no reason for granting certiorari.

In laying foundations for its present contention, the Petition confuses the issue by first departing from the suppression issue to deprecate the defense on the merits. Then (p. 22), it makes the wholly inaccurate assertion that the jury's verdict on the merits "necessarily indicated that it had reached the same conclusion [as to validity of the disclosure] as had Judge Nordbye," in the face of the fact that Judge Nordbye, by his instructions, had expressly forbidden the jury from passing on the disclosure question, had turned it into an argument for conviction (R. 2970) and had permitted many of the disclosure documents to go to the jury as evidence of guilt on the merits!

At page 19 the Petition asserts that it became "necessary that *the claim of deductible expenditures* be thoroughly investigated". This is pure invention. No "claim", in any legal sense, of "deductible expenditures" was advanced by respondents during the disclosure. The compilations made in response to Collector Sauber's suggestions and turned over to the agents were far from the presentation of a "claim", or an amended return, seeking allowance of the expenditures as a deduction from gross income. From the beginning Sauber had told respondents it would not do

any good if they knew all about their expenditures and could prove them because,

> "We absolutely won't allow over-the-ceiling expenditures." (R. 232.)

As we have pointed out (Footnote 2, *ante*) Sauber's position was required by the Treasury regulation (I. T. 3724), which remained binding on all agents concerned with this case until six months after the indictments had been returned.

Finally, it is asserted that because the Court of Appeals held that the record showed,

> "* * * that responsible government officials, from cabinet level to local level, had represented to defendants that their disclosure would result in immunity from criminal prosecution," (Pet. p. 56);

it thereby substituted its own finding for Judge Nordbye's "that respondents had been in no way misled by representatives of the Government." (Pet. p. 33.)

The Court of Appeals was addressing itself to a quite different point than had the trial judge. Respondents had argued in the trial court that, entirely apart from the public pronouncements of the voluntary disclosure document, they were independently entitled to suppression of the evidence because of assurances made to them by local officials during the disclosure. It was that contention, which Judge Nordbye was disposing of in the paragraph of his opinion commencing "In addition, etc." (Pet. 33). Judge Nordbye was talking about what was said after the start of the disclosure—the Court of Appeals did not restrict itself to this. The statements are not in conflict. The Court of Appeals was addressing itself to the whole history of the representations made to respondents.

The facts, as set forth by the Court of Appeals, are without dispute that the immunity promises had been made;

that when Busby first broached this case to Sauber the latter replied there was no reason the disclosure doctrine should not apply; that Sauber directed that the extensive compilations be prepared; that when some of the disclosure compilations were recast the new editions of them bore legends, "Used in disclosure recap", to identify items in them with those used in the first compilation; that repeated assurances were made that this was a civil case and there was nothing to worry about. It is clear beyond doubt that all concerned necessarily realized that respondents believed they were protected by the disclosure doctrine.

It is true that in carefully worded testimony Sauber denied that he had ever said, in so many words, that the disclosure as made was a good one and the Court of Appeals does not find that he ever made such an express admission. The Court of Appeals also recognized that Agent Mamel, long after the disclosure had been made, said there might be a prosecution. It is apparent therefore that the Court of Appeals did *not* overturn any finding of credibility by Judge Nordbye. What it did was to base its legal opinion upon the totality of the representations and conduct of all of the Treasury officials, from the highest to the lowest, as they affected this case.

There is no reason for certiorari here in order to lay down proper standards for appellate review. The Court of Appeals did not undertake to pass on questions of credibility or to overturn disputed factual findings. It merely exercised its duty of drawing legal conclusions as to what consequences flowed from the material and undisputed facts. It enunciates no improper rule of review.

III.

Because the Voluntary Disclosure Doctrine Was Abandoned Nearly Four Years Ago and Because This Case Turns, in Large Part, on the Shift in the Tax Law Relating to Black Market Expenditures, a Case Like It Is Very Unlikely to Happen Again. The Question Involved, Except for These Parties, Is Essentially Academic. Hence Certiorari Should Not Be Granted.

In a large measure this case revolves about the Treasury's change of position with respect to black market expenditures. Had the Treasury initially conceded that black market expenditures for raw materials could be taken as a deductible expense it well may be that respondents would have operated on their original belief that since the black market expenses "washed out" the black market income there was no reason to make a disclosure. And in such event there well might never have been an indictment. But the Treasury first took one position and then another. And the trial court insisted that the "good faith" of the 1948 disclosure be tested in the light of the 1952 law which made the expenditures deductible.

We believe it is apparent that even if the disclosure doctrine had remained in effect there would have been scant likelihood of a similar case getting into the courts. In view of the fact that the entire doctrine was abandoned nearly four years ago it is likely that there will be but few, if any, cases involving it in any way in the courts in the future; at this late date it is a virtual certainty that there will be none falling within the unique fact pattern of this case. In these circumstances we understand it to be the policy of this court not to grant certiorari. (*Rice* v. *Sioux City Memorial Park*, 349 U. S. 70.)

IV.

The Decision Below Was Correct.

For the reasons set forth in the Court of Appeals opinion the decision below was correct. (*Bram* v. *U. S.*, 168 U. S. 532; *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385; *White* v. *U. S.*, 194 F. 2d 215, cert. den. 343 U. S. 930.)

Even if it were thought that there was not full and literal compliance with the voluntary disclosure doctrine, we submit that the Constitution would have required suppression of evidence obtained with the knowledge that respondents believed they were acting under the disclosure doctrine's immunity promise and were protected thereby. (*Gouled* v. *U. S.*, 225 U. S. 298; *McNabb* v. *U. S.*, 318 U. S. 332.)

Moreover, although we contend that respondents complied in good faith with every material requirement of the doctrine, it may be observed that the elastic concept of "good faith" is not contained in, or necessary to, the doctrine. It was a judicial concept attached to the doctrine by Judge Nordbye and applied by him to matters immaterial to Shotwell's tax. In England, which had a "disclosure policy" virtually identical with that of our Treasury, it has been held that a taxpayer who discloses is entitled to suppression, once he has disclosed the nature of his irregularities, even though thereafter, in an attempt to keep his tax liability down, he deliberately prepares false entries in purported regular records that misrepresent both his items of income and expense, *Rex* v. *Barker*, 2 K. B. 381 [1941]. Under the English view suppression must be granted regardless of good or bad faith.

The decision here may also be said to be correct, or to reach a justifiable result, from another point of view—we submit, for the reasons set forth in our conditional cross

petition in No. 471, that respondents were entitled to the immunity promised them in the voluntary disclosure invitations and that the indictment should have been dismissed. If that is correct, then they were at least entitled to suppression as a lesser, but appropriate remedy.

V.

Certiorari Should Not Be Granted Because, If the Government's Contentions Are Permissible, This Court Would Be Required to Study the Entire 3,000 Page Factual Record.

It should be clearly understood that the Department of Justice is asking this Court to review the entire 3,000 page printed record to determine whether, as an entirety, it shows that the disclosure was defective. Although page 17 of the Petition admits

> "* * * that if a taxpayer should have voluntarily disclosed an unpaid tax liability before investigation has begun, and should thereafter co-operate in good faith in a determination of the taxes due, he would be entitled to an exclusion of the evidence thus obtained * * *,"

it thereafter makes a number of factual assertions which have little or no relation to that question and in its footnote 4 asserts that this court should search "the whole record, not merely that portion prior to the ruling" to determine the validity of the suppression ruling.

Carrying this thought out it is asserted (p. 18) that the Government made proof on the trial that respondents, long after the disclosure, "attempted to settle the case through political pressure," from which the conclusion is sought that the disclosure was somehow defective. Obviously this is a *non sequitur*, and even if it be assumed that Shotwell, faced with a potential tax liability and

with its business and customers disrupted by constant visitations of agents, was endeavoring to hasten settlement of its taxes, no connotation, either of criminal guilt or of failure in the initial disclosure, would flow from the assumption.

Again, it is argued that Lubben testified on the trial (we say falsely), that after the disclosure had been made one of the respondents tried to get him to leave the country; from this the petition seeks to infer that the disclosure was defective. Once more the conclusion does not follow from the assumed fact.

But more importantly, this Court could not properly pass on these and other asserted facts, which were vigorously disputed on the trial, without reviewing the entire trial record so that the evidence with respect to them could be placed in proper context and perspective. This, we submit, is so obviously not the function of this Court that it would appear that the charges were made only to prejudice the respondents. This seems clear because the Department of Justice has waived any right, if one ever existed, to ask this Court to consider on the suppression question evidence which went in at the subsequent trial on the merits. No claim was made to the Court of Appeals that it should do what the petition now asks this Court to do. On the contrary the Government there stood solely on the facts developed on the suppression hearing and on which the trial judge had acted (Gov't Ct. of App. Br. pp. 25-29). The present contention therefore is not only unsound but is not open (*Helvering* v. *Minnesota Tea Company*, 396 U. S. 378, 380; *Forged Steel Sales Co.* v. *Lewellyn*, 251 U. S. 502, 515).

It also may be observed that the Petition stresses the fact that the jury brought in a guilty verdict, from which the Court apparently is asked to conclude that the dis-

closure must have concealed something. Once more there is an obvious *non sequitur*. Moreover, the argument merely amounts to saying that because the Department of Justice obtained a conviction by using the evidence sought to be suppressed it has proved that the evidence should not have been suppressed—a thoroughly evil argument.

VI.

The Court of Appeals Did Not Err in Holding That the Disclosure Was Timely.

The petition suggests that the Court of Appeals erred in not sending the case back to the trial court to make a finding on the subject of timeliness.

The short answer to this is that the Government did not take this position in the Court of Appeals and cannot now take it here. (*Helvering* v. *Minnesota Tea Company, supra; Forged Steel Sales Co.* v. *Lewellyn, supra.*)

In their brief as appellants in the Court of Appeals respondents, to show that they had complied with all of the requirements of the policy, asserted that the disclosure was timely and said:

> "The evidence showed that at the time of the disclosure, and for months thereafter, the Shotwell return was in the hands of a Group Chief, along with hundreds of other returns, for a mere *possible* assignment for audit (R. 316). We doubt that the timeliness argument will be renewed [it had been advanced in the District Court *before* the suppression evidence was completed] but if it is, we reserve the right to reply."

When the Government filed its brief, it did not raise the issue. To demonstrate this we quote its "Summary of Argument" as an Appendix hereto. It relegated the entire matter to a mere passing footnote in its brief and the

Court of Appeals properly said that it was presented only "obliquely" (Pet. p. 58). Actually the evidence was not in dispute, no questions of credibility were involved, and had the matter been contested in the Court of Appeals, it was in as good a position as the trial court had been to make a finding (*Cf., City* v. *Denver Union Water Co.*, 246 U. S. 178; *Horwitz* v. *New York Life Ins. Co.*, 9 Cir., 80 F. 2d 295, 302.) And its finding of timeliness is unquestionably correct.

Conclusion.

It is respectfully submitted that the writ of *certiorari* should be denied.

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APPENDIX.

"Summary of Argument". Pages 31 and 32 of Government's Brief in Court of Appeals.

"IV.

"The voluntary disclosure policy was a self-imposed administrative restriction by which the Treasury Department agreed not to refer a taxpayer's case to the Department of Justice for prosecution, provided he had made a full and fair disclosure prior to the initiation of an investigation. Since it did not give the taxpayer any legal right to immunity from prosecution, the motion to dismiss the indictment was properly denied.

"The trial court found, upon the evidence presented at the suppression hearing, that appellant's alleged voluntary disclosure was totally lacking in good faith, and that no actions by Government representatives had given them good cause to believe that they would be granted immunity. Hence the motion to suppress evidence was properly denied."